313 U.S. 9

FILED
APR 2 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 914

HACEL W. NALDER, BANKRUPT,

Petitioner,

vs.

THE FEDERAL LAND BANK OF BERKELEY, A CORPORATION, AND FEDERAL FARM MORTGAGE CORPORATION, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND SUPPORTING BRIEF.

J. D. SKEEN,
E. J. SKEEN,
Counsel for Petitioners.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Supporting brief	5

Table of Cases Cited.

Adair v. *Bank of America National Trust & Savings Association*, 303 U. S. 350, 82 L. Ed. 889	7
John Hancock Mutual Life Insurance Co. v. *Bartels*, 308 U. S. 180, 84 L. Ed. 176	2, 6, 7
Kalb v. *Feuerstein*, 308 U. S. 433, 84 L. Ed. 370	7
Louisville Joint Stock Land Bank v. *Radford*, 295 U. S. 555, 79 L. Ed. 1593	6
In re Monjon, 113 F. (2d) 535	3, 6
Union Joint Stock Land Bank v. *Byerly*, 310 U. S. 1, 84 L. Ed. 1041	7
Wright v. *Mountain Trust Bank*, 300 U. S. 440, 81 L. Ed. 736	6
Wright v. *Union Central Life Insurance Company*, — U. S. —, 61 S. Ct. 196, Advance Sheet, 85 L. Ed. 166	2, 6, 7

Statutes Cited.

Bankruptcy Act, Section 75, subsection (s), 11 U. S. C. A., section 203 (s)	1, 2, 6
Judicial Code, section 240, amended, 28 U. S. C. A. section 347	5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 914

HACEL W. NALDER, BANKRUPT,

Petitioner,

vs.

THE FEDERAL LAND BANK OF BERKELEY, A CORPORATION, AND FEDERAL FARM MORTGAGE CORPORATION, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI.

The petition of Hacel W. Nalder, bankrupt, respectfully shows to the court:

That he filed his petition for relief under Section 75 of the Bankruptcy Act, 11 U. S. C. A., Section 203, and being unable to procure the acceptance of a composition and extension proposal, filed an amended petition under Section 75 (s) of the Act. The matter was referred to a conciliation commissioner, the property appraised, rent fixed, and a stay order entered. The debtor being unable to pay the amount of the rent fixed, the Federal Land Bank of Berkeley and the Federal Farm Mortgage Corporation, mortgagees,

filed a petition in the district court for the appointment of a trustee and for the sale or other disposition of the debtor's property under the provisions of Section 75 (s) (3) of the Act. A trustee was appointed and the property ordered sold. The trustee's report stated that the farm property was worth $7,066.00 and the mortgage indebtedness thereon aggregated $7,004.17. Thereupon the creditors filed a petition reciting that the encumbrances exceeded the value of the property and moved for an order abandoning it as burdensome to the estate. After hearing the district court denied the motion.

The Federal Land Bank and the Federal Farm Mortgage Corporation appealed. On the 2nd day of January, 1941, the United States Circuit Court of Appeals, for the Tenth Circuit, handed down its opinion reversing the district court. The opinion is reported in 116 F. (2d) 1004.

Two important questions are presented by this petition:

(1) Has the district court authority, under Section 75 (s) (3) to abandon property as burdensome, if the value of farm property is not substantially in excess of the mortgage indebtedness?

(2) Can the court lawfully deny the debtor the right of redemption within 90 days of the date of the sale, regardless of what has gone before?

That the writ should be granted for the following reasons:

1. That the decision of the Circuit Court of Appeals of the Tenth Circuit is not in accord with the decisions of this Court in the cases of:

John Hancock Mutual Life Insurance Co. v. *Bartels*, 308 U. S. 180, 84 L. Ed. 176;

Wright v. *Union Central Life Insurance Co.*, — U. S. —, 61 S. Ct. 196, advance sheet, 85 L. Ed. 166.

2. That the decision of the Circuit Court of Appeals of the Tenth Circuit is in conflict with the decision of the Circuit Court of Appeals of the Seventh Circuit in:

In re Monjon, 113 F. (2d) 535.

3. An important question of Federal procedure has been decided, to-wit: The right of abandonment of the property under Section 75 (s) of the Bankruptcy Act, which it is thought is contrary to the provisions of the statute, and the decisions of this Court.

4. That a substantial right, to-wit: The right of redemption, has been denied the petitioners.

Wherefore, petitioner prays for an order of this Court granting a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit in said matter.

J. D. SKEEN,
E. J. SKEEN,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 914

HACEL W. NALDER, BANKRUPT,

Petitioner,

vs.

THE FEDERAL LAND BANK OF BERKELEY, A CORPORATION, AND FEDERAL FARM MORTGAGE CORPORATION, A CORPORATION.

SUPPORTING BRIEF ON QUESTIONS OF THE JURISDICTION OF THE SUPREME COURT TO ISSUE WRIT OF CERTIORARI.

This Court is authorized to grant a writ of certiorari by the express provisions of Section 240 of the Judicial Code (amended), 28 U. S. C. A., Section 347:

> "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified

to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

The petitioner asserts the right to pursue proceedings under a Federal statute, and that right has been denied him.

Section 75(s) (3) clearly provides for the complete administration of the estate in the Federal Court. The property must be sold at public auction and the debtor "shall have 90 days to redeem any property sold at such sale." These rights have both been denied the debtor. The Circuit Court of Appeals has permitted the Federal Land Bank and the Federal Farm Mortgage Corporation to proceed with foreclosure in the State courts, by directing the district court to abandon the property and in so many words, has denied the right of redemption under Section 75 (s).

The judgment is in disregard of the express provisions of the statute and is contrary to the decisions of this Court in:

John Hancock Mutual Life Insurance Co. v. *Bartels,* 308 U. S. 180, 84 L. Ed. 176;
Wright v. *Union Central Life Insurance Bank,* — U. S. —, 61 S. Ct. 196, 85 L. Ed. 166.

and conflicts with the decision of the Circuit Court of Appeals of the Seventh Circuit in:

In re Monjon, 113 F. (2d) 535.

This Court has repeatedly granted certiorari in cases involving Section 75 of the Bankruptcy Act:

Louisville Joint Stock Land Bank v. *Radford,* 295 U. S. 555, 79 L. Ed. 1593;
Wright v. *Mountain Trust Company,* 300 U. S. 440, 81 L. Ed. 736;

Adair v. *Bank of America National Trust and Savings Association,* 303 U. S. 350, 82 L. Ed. 889;
John Hancock Mutual Life Insurance Co. v. *Bartels,* 308 U. S. 180, 84 L. Ed. 176;
Kalb v. *Feuerstein,* 308 U. S. 433, 84 L. Ed. 370;
Union Joint Stock Land Bank v. *Byerly,* 310 U. S. 1, 84 L. Ed. 1041;
Wright v. *Union Central Life Insurance Company,* — U. S. —, 61 S. Ct. 196, 85 L. Ed. 166.

Respectfully submitted,

J. D. SKEEN,
E. J. SKEEN,
Attorneys for Petitioner.

(3518)

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	4
Conclusion	8
Appendix	9

CITATIONS

Cases:	
John Hancock Ins. Co. v. *Bartels*, 308 U. S. 180	6
Monjon, In re, 113 F. (2d) 535	6
Wright v. *Union Central Ins. Co.*, 311 U. S. 273	5, 6
Statute:	
Bankruptcy Act:	
Section 70 (b) (11 U. S. C., Sec. 110 (b))	4
Section 75 (s) (3) (11 U. S. C., Supp. V, Sec. 203 (s) (3))	9

314863—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 914

HACEL W. NALDER, BANKRUPT, PETITIONER

v.

THE FEDERAL LAND BANK OF BERKELEY AND FEDERAL FARM MORTGAGE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 9) is not reported. The opinion of the United States Circuit Court of Appeals for the Tenth Circuit (R. 23–28) is reported in 116 F. (2d) 1004.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Tenth Circuit was entered on January 2, 1941 (R. 28). The petition for a writ of certiorari was filed on April 2, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under Section 75 (s) (3) of the Bankruptcy Act, a debtor not choosing to pay the appraised or reappraised value of his property is entitled to have it sold at public auction, with 90 days to redeem, or whether the court may order it sold without a redemption period or abandoned as burdensome.

STATUTE INVOLVED

Section 75 (s) (3) of the Bankruptcy Act is set out in the Appendix.

STATEMENT

Respondents, the Federal Land Bank of Berkeley and the Federal Farm Mortgage Corporation, hold debts secured by real estate mortgages on property owned by petitioner. In October 1938, petitioner filed a petition under Section 75 of the Bankruptcy Act, seeking to effect a composition or extension of his debts, including his indebtedness to the Federal land bank and the Federal Farm Mortgage Corporation. Thereafter, he amended his petition and was adjudicated a bankrupt under subsection (s) of Section 75. His property was appraised (R. 16–17); a rental on the property was fixed (R. 17–18); his exemptions set aside to him (R. 17); and on April 26, 1939, a three-year stay order was entered by the District Court (R. 17).

Upon petitioner's failure to pay the rental, the Federal land bank and the Federal Farm Mort-

gage Corporation, on May 23, 1940, filed a petition requesting the District Court to order the appointment of a trustee and the sale or other disposition of the property covered by their real estate mortgages (R. 1–4). On June 29, 1940, the District Court ordered the appointment of a trustee to sell or otherwise dispose of the property (R. 4–5). A trustee was appointed on July 11, 1940 (R. 6), and he filed his report on August 17, 1940, in which he found (1) that the reasonable value of the property was not in excess of $7,066; (2) that the valid existing and unpaid liens against the property exceeded $7,100; and (3) that there was no equity in the property for the benefit of petitioner or of any general creditor (R. 8–9). The trustee recommended that the property be released from the jurisdiction of the bankruptcy court and that the mortgage holders be free to take action for the enforcement of their liens (R. 8).

The Federal Land Bank and the Federal Farm Mortgage Corporation filed a motion requesting that the property be abandoned as burdensome to the estate. On October 21, 1940, the district court denied this motion and ordered the trustee to sell the property at public auction, subject to redemption by petitioned within 90 days (R. 10–12).

Upon appeal by the Federal Land Bank and the Federal Farm Mortgage Corporation, the United States Circuit Court of Appeals for the Tenth Circuit reversed this order of the district court (R.

28). The circuit court of appeals held: (1) petitioner should first be given an opportunity to acquire the property free and clear of encumbrances by paying into court its value as fixed in the proceedings; (2) if he failed to avail himself of this right, the district court should then determine whether there was a reasonable probability of realizing from the sale of the property any surplus over the encumbrances for the benefit of general creditors or petitioner; (3) if there was such a probability, the district court should order a sale pursuant to the provisions of Section 70 (b) of the Bankruptcy Act (11 U. S. C., Sec. 110 (b)), without a right of redemption; and (4) if there was not such a probability, the district court should order the property abandoned by the trustee as burdensome.

ARGUMENT

Petitioner contends that under Section 75 (s) (3) of the Bankruptcy Act he is entitled to have his property sold at public auction, with a right to redeem the property within 90 days thereafter. This claim disregards the wording of the statute and is not supported by any decision.

Section 75 (s) (3), set out *infra*, p. 9, provides initially that at the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property. Then follow two provisos. The first is that "upon request of any * * * creditor, or * * * of the debtor, the

court shall cause a reappraisal of the debtor's property, or * * * after * * * hearing, fix the value of the property, * * * and the debtor shall then pay the value so arrived at into court * * *." The second proviso provides that "upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction." The subsection concludes with the sentence: "If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act."

In *Wright* v. *Union Central Ins. Co.*, 311 U. S. 273, relied on by petitioner, the Court held that the right conferred upon the debtor by the first proviso, to acquire the property by paying its redetermined value, cannot be defeated by a request of a secured creditor for a public sale under the second proviso or by disposal of the property by court order under the last sentence of the subsection. Pursuant to that decision the court below carefully preserved petitioner's right under the first proviso to redeem at a reappraised value (R. 27–28). What petitioner seeks is not that right, but a public sale under the second proviso, with a 90-day redemp-

tion period.[1] The statute, however, confers no option upon the debtor of calling for a public sale, but only upon secured creditors. Here no creditor has asked for a public sale, and the last sentence of subsection (s) (3), under which the property is to be disposed of unless petitioner asks for a reappraisal, contains no reference to a public auction or to a right of redemption. Instead, it contemplates that upon a failure of the debtor to comply with orders of the court, such as the order here for the payment of rental, the debtor's estate shall be administered and liquidated in the same way as any other estate in bankruptcy. Under the provisions of the general Bankruptcy Act, of course, a trustee may be authorized to sell property without

---

[1] *In re Monjon*, 113 F. (2d) 535 (C. C. A. 7th), also cited by petitioner as in conflict with the decision below, does contain some language inconsistent with the decision below as to the power of the court to dispense with sale and confirm title in the creditor. Apparently the Seventh Circuit thought that under Section 75 (s) (3) mortgaged property might be disposed of only (1) by payment of the appraised or reappraised value by the debtor, or (2) by public auction if a secured creditor demanded it. This view appears, however, to have been connected with the court's holding that the right of a secured creditor to a sale at public auction was superior to the debtor's right to buy at a reappraised price, and that construction of the Act was overturned by this Court in the *Union Central Ins. Co.* case, *supra*.

John Hancock Ins. Co. v. *Bartels*, 308 U. S. 180, also relied upon by petitioner, has no especial relevance to this case. It held that a debtor's petition under subsection (s) of Section 75 might not be dismissed upon the ground that there was no reasonable probability of the debtor's rehabilitation.

any right of redemption or to abandon as burdensome property lacking in any equity for the debtor or for general creditors.[2]

It is apparent, moreover, that the decision below does not in reality operate to any substantial detriment of petitioner, by failing to order a public sale with a 90-day redemption period. Neither a sale of the property without a redemption period nor its abandonment is authorized unless and until petitioner fails to avail himself within a reasonable time of his right to acquire the property by paying its appraised value into court. If petitioner does so fail no purpose would be served by affording him an additional 90-day redemption period. There is no limitation on the right of a mortgagee to bid the full amount of his claim at a public sale, so that it would in all likelihood be more expensive for the debtor to redeem from a public sale than to acquire the property in the first instance by paying its appraised value into court.

Nor would petitioner be injured if, subject to the conditions laid down by the decision below, the trustee should be authorized to abandon the property rather than to sell it at public sale. By abandonment the bankruptcy court merely relinquishes

---

[2] There can be no doubt that the phrase "as provided for in this Act" in the last sentence of subsection (s) (3) must be taken to refer to the Bankruptcy Act as a whole, and not merely to Section 75. The sentence contains two references to "this section," and it is accordingly clear that when the word "Act" is used it means something more than "section."

its exclusive jurisdiction over the property and the mortgagees are permitted to foreclose their security. If that course should be followed, the debtor would, under state law, have a redemption period well in excess of the 90 days for which he contends.

CONCLUSION

The decision below is plainly correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

THOMAS E. HARRIS,
Special Assistant to the Attorney General.

ROBERT K. MCCONNAUGHEY,
General Counsel.

ALFRED LETZLER,
Attorney, Farm Credit Administration.

MAY 1941.

APPENDIX

Section 75 (s) (3) of the Bankruptcy Act, 11 U. S. C., Supp. V, Sec. 203 (s) (3):

> At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: *Provided,* That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: *Provided,* That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum

per annum interest, into court, and he may apply for his discharge, as provided for by this Act. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.

U. S. GOVERNMENT PRINTING OFFICE: 1941